IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

MONDAY, THE 16TH OCTOBER 2006 / 24TH ASWINA 1928

CRL.A.No. 667 of 2001(A)

S.T.1630/1997 of JUDL. MAGISTRATE OF FIRST CLASS COURT-II, THRISSUR

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APPELLANT/COMPLAINANT:

K.V.SADHANANDAN, S/o. KODIYATTIL VELAYUDHAN
AYYANTHOLE, THRISSUR.

BY ADV. SRI.N.ANILKUMAR

RESPONDENTS: STATE & ACCUSED:

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1. STATE OF KERALA, REP. BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

2. M.K.SEBASTIAN, S/O.MULLAKARA
KUNJUVAREED, POONKUNNAM P.O.,
THRISSUR - 680 002.

BY ADV. SRI.M.V.MATHEW
SRI.LOUIS JOHN PAREKKAT
BY PUBLIC PROSECUTOR SRI.K.S.SIVAKUMAR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 16/10/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.M. JAMES, J.

Crl.Appl. No. 667 of 2001

Dated this the 16th October, 2006.

JUDGMENT

The complainant in S.T.No.1630/1997, on the file of the Judicial First Class Magistrate Court-II, Thrissur, is the appellant. The complaint is preferred under Section 138 of the Negotiable Instruments Act, in short 'the Act'.

2. The complainant examined three witnesses and marked eight documents, to prove the allegation against the second respondent, accused. The accused examined one witness, the then Manager of the Bank, as DW.1, and marked four documents. The court below found that the signature in Ext.P1 cheque is entirely different than the admitted signatures maintained by PW.3, the Bank Manager, in the usual course of business of the Bank, through Exts.D1 to D4. PW.2 is the manager of the Bank to which Ext.P1 cheque was presented for clearance and sent to the bank of PW.3, the drawer bank. The attempt of the second respondent, accused, was to establish that he did not issue any cheque as Ext.P1, and there was also no transaction with the appellant. Ext.P7 is the reply notice

issued by the second respondent, accused. In it, second respondent has stated that there was no transaction with the appellant, and the signature in Ext.P1 cheque is not that of his.

3. The appellant has to prove, at the first instance, that the cheque was drawn by the accused, on an account maintained by him with a Banker, for payment of any amount of money to the appellant, from out of that account, for the discharge of the debt due to him. This is prima facie the first part of the ingredients of Section 138 of the Act. The second part of Section 138 of the Act starts, when the cheque is presented for clearance, it is returned by the bank unpaid, for the reasons stated therein, and then the offence is committed by the drawer of the cheque. The third part is contained in the proviso (a) to (c) of Section 138 of the Act.

4. Section 139 of the Act lays down that, unless the contrary is proved, the holder of a cheque received the cheque, of the nature referred to in Section 138 of the Act, for the discharge, in whole or in part, of any debt or other liability. Thus, the presumption available under Section 139 of the Act is rebuttable, by proving otherwise than as alleged by the holder of the cheque. It is the legal

principle that the rebuttal evidence need not be on the whole prosecution case. It need only be on a particular point that is denied by him. Unless all the ingredients contained under Section 138 of the Act are established, the offence under Section 138 of the Act, cannot be drawn against the accused.

5. In Ext.P7 itself, the accused has denied the entire transactions and any debt due to the appellant. In such circumstances, it is for the appellant to establish the first part of the ingredients of Section 138 of the Act. The evidence available through PW.1, the appellant himself, are insufficient to come to a conclusion or finding, as per the law, that Ext.P1 cheque was issued by the accused, second respondent, by 'drawing a cheque', as in Ext.P7 itself, there was a denial. In such a factual situation, it is necessary for the appellant to establish that the cheque has been drawn from the bank of PW.3, and, therefore, it is for the accused to explain, how the cheque that was operated in the account of the accused, came into the possession of the appellant.

6. I fully agree with the findings of the lower court that the signatures in Exts.D1 to D4 are not tallying with the signatures found in Ext.P1 cheque. It can be said that Exts.D1 to D4 contain the signatures of the accused. On the other hand, Ext.P1 has got a writing, which the lower court found as varying with the admitted signatures, Exts.D1 to D4, and DW.1 also has stated that it is not tallying with the admitted signatures maintained by the bank, where the accused was working as a stenographer.

7. I have also compared the signatures contained in Exts.D1 to D4, and also the writings (signatures) in Ext.P1 cheque. I find that there is absolutely no similarity, for no expertise opinion is required to come to such a conclusion, as so glaring is the difference in the signatures in these documents.

8. The learned counsel appearing for the appellant submitted that though the case is of the year 1997, the appellant may be given an opportunity to establish the case, by adducing further evidence. Counsel for the accused, on the other hand, opposed the same, on the plea that he has got no transaction with the appellant. The significant point that comes out and which has not been discussed

by the court below is that the accused had sent a stop memo to the Bank of DW.1. This has been spoken to by him. There is no explanation available or evidence adduced, as to how Ext.P1 cheque, which was issued by the Bank of PW.3, DW.1, had come to the possession of the appellant. It is because of these lacunae, I am constrained to agree with the submissions of the counsel for the appellant that an opportunity to both sides would enable them to bring out the facts that are required to be established, by adducing evidence, on the points of their respective contentions.

9. In view of the above discussions, I set aside the impugned judgment dated 4.12.2000, and restore S.T.No.1630/1997, on the file of the Judicial First Class Magistrate Court-II, Thrissur. The learned Magistrate shall give an opportunity to both sides to adduce additional evidence.

10. The parties shall appear before the court below on 21.11.2006.

11. The learned Magistrate shall dispose of the matter, as early as possible, in any case, within three months from the date of appearance of the parties. While disposing of the matter, the learned Magistrate shall independently take decision untrammeled by the discussions contained herein.

Return the records to the lower court.

Crl.Appeal is disposed of as above.

J.M. JAMES,
JUDGE

nj.

J.M. JAMES, J.

Crl.App.No. 667 of 2001

JUDGMENT

16th October, 2006.